No. 88-1597

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners

v.

BRIDGET C. MERGENS, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR TARA LYNN BURR, ET AL., AND RICHARD GARNETT, ET AL., AS AMICI CURIAE IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether allowing public school students to meet before or after school in an empty classroom for voluntary, student-initiated religious discussions, Bible study, and prayer, on equal terms with other student groups, violates the Establishment Clause of the First Amendment.

2. Whether prohibiting public school students from meeting before or after school in an empty classroom for voluntary, student-initiated religious discussions, Bible study, and prayer, on equal terms with other student groups, violates the Equal Access Act, 20 U.S.C. 4071-4074, the Free Speech or Free Exercise Clauses of the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

1. Tara Lynn Burr, Kenneth Dudek, and James Huggins are public high school students attending McKinley High School in Buffalo, New York. They requested to meet together after school in an empty classroom for a voluntary, extracurricular Bible study club on the same terms as other voluntary student organizations in the school. Their school district responded by filing suit against them (individually and as representa-

tives of other students who might wish to participate in such a group), in the Supreme Court for the State of New York, *Board of Education* v. *Burr*, No. 11097/88 (filed Nov. 15, 1988), seeking a declaratory judgment on the constitutionality and applicability of the Equal Access Act. The school district contended that the current state of the law is "so unsettled" that it would be subject to a lawsuit, whether it granted or denied the request. (Complaint, ¶ 12). Prior to initiating suit, however, the school district denied permission to the students to meet on school property on the ground that such meetings violate the Establishment Clause of the First Amendment. In affidavits filed with the suit papers and in subsequent proceedings, the school district has maintained, even in the absence of any prior challenge to the Equal Access Act in the Second Circuit, that it is "neutral" as to the ultimate result of the litigation, but that it vigorously contests the constitutionality of the Equal Access Act. On April 18, 1989, a preliminary injunction was granted (without formal opinion) allowing the students to meet. The case is presently in the discovery phase.

2. Richard Garnett, Scott Germino, Robert Ryan, and Richard Tracy are public high school students attending Lindberg High School in Renton, Washington. They requested permission to meet together before school in an empty classroom, on an equal basis as other noncurricular student groups, to discuss religious and moral issues, read the Bible, and pray. Upon final refusal by the school district, the students filed suit in United States District Court for the Western District of Washington, claiming violation of their rights under the Equal Access Act and the First Amendment. The district court denied their motion for a preliminary injunction and entered judgment in favor of the school district. On appeal, a panel of the United States Court of Appeals for the Ninth Circuit affirmed, several weeks prior to the Eighth Circuit's decision in this case. *Garnett v. Renton School District No. 403*, 865 F.2d 1121 (9th Cir. 1989). On January 30, 1989, the students filed a petition for rehearing with a suggestion for rehearing *en banc*. The Ninth Circuit has not yet acted on the petition for rehearing.

3. The purpose of this brief is to draw the Court's attention to the continuing controversy in high schools and lower courts across the nation over voluntary, student-initiated religious discussions on the premises of public schools even in the face of a federal statute governing the matter. While amici submit that the carefully considered policies established by the Congress in the Equal Access Act are fully constitutional, and that the decision of the United States Court of Appeals for the Eighth Circuit in this case was correct, we nonetheless urge this Court to grant the writ of certiorari and resolve this important question.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The factual circumstances in the instant case closely resemble those in Buffalo and Renton, where *amici* are involved in litigation against their school districts. The common factual elements include the following:

(1) The meetings at issue were initiated solely by students and were to be conducted either before or after school by students, with strictly voluntary participation and with no encouragement or control by the schools. In no case would participation be graded or be the basis for receiving school credit.

(2) The policy or practice of each school was to permit students to form organizations and to meet on the premises of the school for a wide variety of purposes.

(3) In each case, the students requested that they be treated in the same way as other student groups, with

the sole exception that they did not request an active school "sponsor" (though they were willing, if school authorities requested it, to have a teacher or other adult attend for purposes of maintaining order).

(4) In each case, school officials refused to allow the students to meet,[1] and the sole ground for the refusal was the content of their intended speech. In no case was the refusal based on any content-neutral time, place, or manner regulation.

(5) In each case the school district officials claimed that it would violate the Establishment Clause to allow the students to meet.

(6) In each case, the school district officials also defined every *other* student club as "curriculum-related" and claimed to limit the "forum" to "curriculum-related" clubs. The clubs so defined as "curriculum-related" included chess clubs (in all three cases[2]), sports clubs (scuba diving in *Mergens*, skiing and bowling in *Renton* and *Burr*), and social, cultural, or civic clubs (Interact and Zonta in *Mergens*, Special Kiwanis Youth, Girls'

[1] Petitioners' statement of the case asserts that Bridget Mergens, *et al.* (the students) "had been meeting informally for religious speech for some time when the request was made" (Pet. 5) and that principal James Findley "told Mergens that the school had no objection to the continuation of the group's informal meetings" (Pet. 6). The petition contains no record citations, and in our review of the record we have been unable to find support for these statements. Perhaps "informed meetings" refers to the ability to talk together in the hallways or in the cafeteria during lunchtime without censorship. We believe the record is clear that the students in this case, like the students in the Buffalo and Renton cases, were never permitted to meet in empty classrooms or other appropriate locations, as other student groups were permitted to do.

[2] During the pendency of this controversy, school officials in *Renton* renamed the chess club the "Advanced Strategy and Tactics Club," apparently in order to make it appear more "curriculum-related."

Club, and Minority Student Union in *Renton*, and Students Against Drunk Driving in *Burr*).[3]

REASONS FOR GRANTING THE WRIT

The petition raises two important issues of First Amendment law concerning freedom of speech, religion, and public education, issues that have persisted, notwithstanding a federal statute addressing the matter. The first is whether the Establishment Clause requires that school districts discriminate against student speech on the basis of religious content, by singling them out for exclusion from a limited forum made available for student speech and association on other subjects. Three Justices of this Court voted to grant certiorari in a case presenting this issue earlier this Term. *Perumal* v. *Saddleback Valley Unified School District*, No. 88-340, *cert. denied*, 109 S. Ct. 327 (1988). This Court granted certiorari on this issue in *Bender* v. *Williamsport Area School District*, 457 U.S. 534 (1986), but did not reach the merits because of a jurisdictional defect.

Recent decisions of the Eighth Circuit (in the instant case) and the Ninth Circuit (in *Renton*) are in direct conflict on this issue, on almost identical facts. The Eighth Circuit noted that this Court has rejected the claim that allowing university student religious groups to meet on an equal basis violates the Establishment Clause. See *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The court reasoned that the only constitutionally relevant distinction between high school students and university students is that the former are "less mature" and therefore potentially more likely to perceive a posture of neutrality as an endorsement of religion (Pet. App. 19 n.2).

[3] School district officials in the *Burr* case take the position that every one of some 277 student clubs on the school districts' 1987-1988 roster is "not non-curriculum-related" even though this includes such clubs as "Dungeons and Dragons." See Plaintiff's Reply to Defendants' Amended Answer and Counterclaim, ¶ 32, at 9.

The court rejected this distinction, both on the basis of Congress's findings when it passed the Equal Access Act, and on its own evaluation of the facts of the case. Pet. App. 19-20. By contrast, the Ninth Circuit held that "[t]he impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals—distinguish public secondary schools from public universities." *Renton*, 865 F.2d at 1126.

Moreover, as noted in the petition for certiorari, there is a serious conflict between the determination of Congress on this issue in passing the Equal Access Act, which was upheld by the court of appeals in this case, and the decisions of several other lower federal and state courts in cases predating the Act. *See, e.g., Nartowicz* v. *Clayton County School District*, 736 F.2d 646 (11th Cir. 1984) (establishment clause prohibits voluntary student religious meetings); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (same); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) (same); *Trietley* v. *Board of Education*, 409 N.Y. Supp. 2d 912 (1978) (same).

The second question is whether the rights of public high school students under the Equal Access Act or under the First Amendment include the right to meet together for voluntary speech during nonschool hours in school facilities generally made available to students during such times. See *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

Under the Equal Access Act, any public school that maintains a "limited open forum" is forbidden "to deny equal access or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the

speech at such meetings." 20 U.S.C. 4071. The Act defines a "limited open forum" as an "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.*, § 4071(b). The legislative history contains many examples of what Congress considered "noncurriculum related" groups for purposes of the statute. These include camera clubs, sports clubs, service clubs (such as "Key Clubs"), stamp clubs, business clubs, chess clubs, and social or cultural clubs. See 130 Cong. Rec. S8337-S8366 (daily ed. June 27, 1984); 130 Cong. Rec. H7734-35 (daily ed. July 25, 1984).

Petitioners contend, and the Ninth Circuit held, that school districts must have broad discretion to determine which student clubs are "curriculum-related." *Renton*, 865 F.2d at 1127. By contrast, the Eighth Circuit below observed:

> Allowing such a broad interpretation of "curriculum-related" would make the EAA [Equal Access Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA.

Pet. App. 12. The experience of *amici* is that school authorities can, and will, manipulate the concept of "curriculum-related" so as to find every club whose speech they approve of "curriculum-related," and those whose speech they deem inappropriate "unrelated." As the Eighth Circuit recognized, the Equal Access Act requires an objective, judicially reviewable standard for determining when a school has established a limited open forum. Of course, school districts have the authority to determine the contours of their own curriculum. But it

is *Congress's* understanding of the term "noncurriculum-related" that must control statutory construction.

The division among the lower courts has become a serious source of confusion, manipulation, and acrimony. While *amici* believe that the decision below is correct, we also believe, along with students and school administrators involved in needless conflicts in other parts of the country, that it is time for these questions to receive an authoritative resolution. The instant case is representative of the facts and issues presented in others. Accordingly, *amici* urge this Court to grant the petition for a writ of certiorari, at which time *amici* wish to present further briefing going to the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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